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SUPREME COURT, U.S.

No. 06-962

In the Supreme Court of the United States

XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, ET AL., PETITIONERS,

v.

WALDAMAR MILLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

Respondents deny that the Ninth Circuit's decision creates a split in the circuits, or that the issue decided by the Ninth Circuit is of sufficient importance to warrant the attention of this Court. Respondents are wrong on both counts. The Ninth Circuit's decision conflicts with a decision of the Second Circuit upholding the legality of the very same offset provision in the very same nationwide pension plan. Moreover, the Ninth Circuit's decision is of great importance because it mandates a single approach to valuing prior distributions of retirement benefits, to the exclusion of other methods commonly used by pension plans. For these reasons, the Court should grant the Petition.

1. Review is warranted to resolve the conflict between the circuits.

Contrary to Respondents' assertion, there is a conflict between the Ninth Circuit's decision and the Second Circuit's decision in *Frommert* v. *Conkright*, 433 F.3d 254 (2d Cir. 2006). Indeed, the two decisions reach opposite results with respect to the same offset provision in the same nationwide pension plan. Respondents stress the Second Circuit's holding that the Xerox Plan could not lawfully apply the offset to *pre*-1998 rehires (because the Plan had not sufficiently disclosed the offset to these rehires). Br. in Opp. 2-3. Respondents ignore the Second Circuit's additional holding that the Plan *could* lawfully apply the offset to *post*-1998 rehires (because, as to those rehires, the Plan made sufficient disclosure). See Br. in Opp. 3. It is this holding that conflicts with the Ninth Circuit's decision that the Plan could not lawfully apply the offset to *any* rehires. Respondents' efforts to dissolve the conflict with the Second Circuit are unavailing.

a. Respondents assert that the Second Circuit "did not . . . reverse on the anti-forfeiture claim" because of its ruling on the disclosure issue. Br. in Opp. 4. To the contrary, the Second Circuit expressly affirmed the district court's

ruling that the Xerox Plan's offset did not cause a forfeiture. *Frommert*, 433 F.3d at 273. Respondents point to the Second Circuit's statement, in a footnote, that it did not reach the anti-forfeiture claim, *id.* at 263 n.10, but the court explained in the same footnote that the forfeiture claim was duplicative of the claim that the 1998 plan amendment impermissbly cut back benefits of pre-1998 rehires. *Id.* In other words, the court did not need to consider whether the offset resulted in a forfeiture with respect to pre-1998 rehires because, as to those participants, the offset could not be applied for other reasons. The court made clear, however, that after the offset was added to the Plan in 1998, it could be applied to participants rehired after that date. *Id.* at 269 (the offset "may permissibly be applied" to post-1998 rehires). Respondents simply ignore the Second Circuit's clear statement that it vacated the district court's judgments "except as to the anti-forfeiture claim . . . which we affirm." *Id.* at 273. The Second Circuit confirmed this holding by directing the district court, on remand, "to determine which of the plaintiffs were rehired by Xerox after the Plan was amended to include the [so-called] phantom account and thus be bound by its terms." *Id.* at 269.

b. Respondents quote the district court's statement on remand in *Frommert* that utilization of the Xerox Plan's offset "has been soundly rejected" by the Second Circuit. Br. in Opp. 4-5. The district court, however, was referring to the Second Circuit's holding that the offset could not be used with respect to pre-1998 rehires. The same district court order instructed the parties to identify which plaintiffs were rehired after the 1998 plan amendment so that the offset may be applied to them. *Frommert v. Conkright*, No. 00-cv-6311L, __ F. Supp. 2d __, 2007 WL 174157, at *5 (W.D.N.Y. Jan. 24, 2007). Quoting the Second Circuit, the district court explained, "[F]or employees rehired subsequent to the amendment of the Plan through the 1998 SPD, the [so-called] phantom account is a compon-

ent of the Plan that they joined and thus may permissibly be applied to them." *Id.* (citation omitted).[1]

c. Respondents state that "[n]either the District Court [in *Frommert*] nor the Second Circuit addressed ERISA's rules regarding actuarial equivalence." Br. in Opp. 4. This is precisely why there is a circuit split. The Ninth Circuit concluded that the actuarial equivalence rule applies to offsets (and applies in only one way), while under the forfeiture analysis in *Frommert*, the actuarial equivalence rule does not apply to offsets. The Ninth Circuit concluded that an offset causes a forfeiture of an employee's accrued pension benefit unless the actuarial equivalence requirement is satisfied. App. 8a ("[B]ecause ERISA requires actuarial equivalence for any reduction in benefits based on prior distributions, Xerox's method of calculating the offset is impermissible."). By contrast, the Second Circuit in *Frommert* affirmed the district court's conclusion that the Xerox Plan's offset does not cause a forfeiture of accrued benefits because the benefit an employee accrues is determined only after applying the offset; the offset defines the accrued benefit rather than reduces it. *Frommert*, 433 F.3d at 273, *aff'g in relevant part*, 328 F.Supp.2d 420, 438 (W.D.N.Y. 2004). Accordingly, under the *Frommert* ruling, there is no reduction in benefits on account of an offset that must be subject to the actuarial equivalence rule imposed by the Ninth Circuit.

d. Respondents suggest that, even if the Court were to reverse the Ninth Circuit, the Xerox Plan might still be invalidated below on disclosure grounds. Br. in Opp. 8. However, the Ninth Circuit rejected challenges to the Xerox Plan based on allegedly insufficient disclosure of the Plan's offset provision. *See Hammond v. Xerox Corp. Ret. Income Guar. Plan*, 225 F.3d 662 (9th Cir. 2000)

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[1] Respondents "doubt" that the *Frommert* plaintiffs included rehires after the 1998 amendment who would have been affected by the Second Circuit's decision. Br. in Opp. 3 n.2. In fact, the *Frommert* plaintiffs include such rehires.

(mem.), *aff'g* No. CV 2:97-8349, 1999 WL 33915859 (C.D. Cal. Apr. 8, 1999).

2. This case presents a question of federal law of national importance.

The amicus brief of the American Benefits Council and the ERISA Industry Committee documents the "devastating" effects the Ninth Circuit's decision will have for "the very large number of defined benefit pension plans that take into account other retirement arrangements in determining benefits." Amicus Br. 2, 7. Although Respondents now seek to downplay the importance of this issue, Br. in Opp. 9-11, they acknowledged its importance below: "The issue that was resolved, the relationship between an earlier lump sum payment and accrued monthly retirement benefits, is potentially of broad application to defined benefit plans under ERISA." Appellants' Application for Att'ys' Fees at 5. As one of Respondents' declarants stated, the Ninth Circuit's decision "has established an important precedent, with potential nationwide repercussions." *Id.*, Decl. of Jeffrey Lewis ¶ 13. Furthermore, Respondents' estimate of the cost to the Xerox Plan of complying with the Ninth Circuit's decision – between $100 million and $250 million, *id.* at 9 – would make the Ninth Circuit's judgment one of the largest ERISA judgments ever, even before considering its impact on any other pension plan.

The Ninth Circuit's decision is far-reaching because the Xerox Plan's offset approach is commonly used by other pension plans, and because the Ninth Circuit invalidated all offset approaches but one.

a. The method used by the Xerox Plan to value prior distributions – defining the offset as the benefit that the employee would have received at retirement had the employee not received any benefit distributions before retirement, see Pet. 5-6 – is commonly used by other pension

plans.[2] For example, plans that offset for Social Security benefits follow exactly the same approach: The offset equals the Social Security retirement benefit the employee *would have received* at Social Security retirement age had the employee not received any Social Security retirement benefits before then, even if the employee actually elected to begin Social Security retirement benefits early. Under the Ninth Circuit's decision, these plans would be unlawful.[3] As this Court has noted, plans with Social Security offsets are among the most common type of offset arrangements. *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 514-19 (1981); see Amicus Br. 18-19.

In using the same method to value prior distributions, the Xerox Plan complies with the seminal guidance on floor-offset arrangements, Revenue Ruling 76-259, App. 96a-98a, which provides that a floor-offset arrangement *must* – not may – include an offset for "the additional amount that *would have been provided* by any prior distribution from the account balance." App. 98a (emphasis added). The verb form used in the Revenue Ruling

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[2] Respondents imply that the Xerox Plan values prior distributions using the rate of return on defined benefit plan assets. Br. in Opp. 2, 6-7. In fact, under the Plan, prior distributions are made from a participant's defined contribution account, and the offset is based on the rate of return the participant would have earned in that defined contribution account had the distribution not been made. App. 3a-4a. Because investment of participants' defined contribution accounts is professionally managed rather than participant-directed, it is the same rate of return earned by other Xerox employees who waited until retirement to receive distributions from their defined contribution accounts.

[3] Social Security benefits are constantly being adjusted for subsequent changes in national average wages and inflation. 42 U.S.C. § 415(a)(1)(B) (national average wage adjustment), 415(i) (inflation adjustment). As a result, the method of calculating Social Security offsets described above would violate the Ninth Circuit's decision because the method takes into account "later developments" and "later change[s] in the value" of an employee's Social Security benefits. App. 8a, 10a.

("would have been provided") asserts a past contrary-to-fact condition: Even though a prior distribution *was* made, the offset amount is to be determined as though the prior distribution had *not* been made.[4] The offset method in the Xerox Plan is the most direct way to implement this requirement.

b. The Ninth Circuit's decision is also far-reaching because it permits defined benefit plans to determine offsets for prior distributions *only* using the method prescribed by the court. Respondents insist that the Ninth Circuit merely held that a plan "must" define the offset using interest rate or other "actuarial factors," without regard to when those factors are in effect. Br. in Opp. 1, 5, 9. However, the reason the Ninth Circuit found the Xerox method unlawful was precisely because it took into account changes in facts and economic circumstances after the time of the prior distribution. App. 8a-10a. In the court's view, "[a]ny later change in the value of the [prior] distribution" may not be taken into account in determining the amount of the offset. App. 8a. The court explained that using interest rates, life expectancies, or investment returns from a later time would constitute a "revisionist approach to already-distributed accrued benefits." App. 10a. Instead, according to the Ninth Circuit, the value of the prior distribution must be determined based solely on interest rates, life expectancies, and other factors in effect at the time of the prior distribution. The Ninth Circuit's opinion therefore bars *any* method of benefits coordination that takes into account changes in facts or economic circumstances that occur after the prior distribution, including changes in prevailing interest rates, mortality, or investment returns. *Id.*

All defined benefit pension plans value prior distributions for one purpose or another, including coordinating employees' pension benefits with retirement income em-

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[4] See II George O. Curme, *A Grammar of English Language* 427-28 (Verbatim Books photo. reprint 1977) (1931).

ployees receive from other employer-funded sources. Yet most plans do not value prior distributions using the method mandated by the Ninth Circuit. Amicus Br. 3, 10-11. Indeed, one need not look far for evidence that the Ninth Circuit's decision is at odds with common methods for valuing prior distributions. The very regulation on which the Ninth Circuit based its opinion values prior distributions using a method that would violate the court's own decision.[5]

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[5] 26 C.F.R. § 1.411(a)-7(d)(2)(ii)(B) & (d)(4)(iv)(C) (2007), App. 85a, 91a (valuing prior distributions based on current interest rates rather than interest rates in effect at time of prior distribution); Pet. 13. The Ninth Circuit's decision is also at odds with other Treasury guidance, including the method Treasury has proposed for calculating offsets for prior distributions under 26 U.S.C. § 415(b). The proposed method would require offsets to be determined using interest rates and other actuarial assumptions in effect currently rather than at the time of the prior distribution. Proposed Treas. Reg. § 1.415-2(b), 70 Fed. Reg. 31,214, 31,237-38 (May 31, 2005). The preamble to the proposed rule explains: "[T]he actuarial assumptions used to calculate the annual benefit attributable to a prior distribution are [to be] determined as of the current determination date." *Id.* at 31,219.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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